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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1971

No. _____

JAMES LEE GUTHRIE,

Petitioner,

v.

STATE OF ARIZONA and
GARY K. NELSON, as
Attorney General of the
State of Arizona,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF ARIZONA

The petitioner, JAMES LEE GUTHRIE, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the Supreme Court of the State of

Arizona in this case, entered on April 21, 1972 and made final by the Order of the Supreme Court of the State of Arizona in this case denying petitioner's motion for rehearing, entered on May 23, 1972.

OPINION BELOW

The opinion of the Court below, filed April 21, 1972, is reported at 108 Ariz. _____, 496 P.2d 580 (1972). The order of the Court below entered on May 23, 1972, was not accompanied by an opinion.

JURISDICTION

The Order of the Supreme Court of the State of Arizona, entered on April 21, 1972, and appended hereto, infra at page 39 was made final by the order of the Supreme Court of the State of Arizona, denying petitioner's Motion for Rehearing,

entered on May 23, 1972, and appended hereto, infra at page 48 . The jurisdiction of this Court is invoked under 28 U.S.C.§1257(3).

QUESTIONS PRESENTED

1. Can a felony defendant be tried in the absence of a material witness for the defense?

2. Can a felony defendant be denied a new trial based upon newly discovered evidence which would completely exonerate defendant where the question of whether such material witness offering the evidence would claim the privilege against self-incrimination was determined at the hearing on the motion for new trial instead of being postponed until the time of the new trial?

3. Must the trial court call as

its own witness when requested to do so by defense, a named paid police informer who was a material witness to the crime when the defense does not want to vouch for his integrity even by the implication of calling him as a defense witness?

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The principal constitutional provisions involved are the Confrontation, Compulsory Process of Witnesses, and Effective Assistance of Counsel Clauses of the Six Amendment, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Arizona Rules of Criminal Procedure, Rule 241, Rule 243, Rule 244, Rule 310 and Rule 311 are set forth below.

"Rule 241.

The Court on the application of either party or on its own motion may in its discretion for good cause grant a continuance."

"Rule 243.

An application for continuance shall be in writing. The application shall specify the grounds upon which it is based, shall be signed by the county attorney or by counsel for the defendant, as the case may be, and shall be accompanied by the certificate of the signer that it is made in good faith."

"Rule 244.

If the application for continuance is on the ground that a witness is absent, it shall state:

1. That the witness is absent.
2. The facts expected to be proved by the witness.
3. That the testimony of the witness is material.
4. The name and residence of the witness, if known.
5. Facts showing that due diligence has been used to obtain the witness.

6. Facts showing that the applicant expects to be able to procure the attendance of the witness at a specified time.

7. That the witness is not absent through connivance or consent of the applicant.

8. That the applicant believes that the action cannot be tried with justice to the party without the evidence of such witness."

"Rule 310.

The court shall grant a new trial if any of the following grounds is established:

1. That the jurors decided the verdict by lot.

2. That the verdict is contrary to law or to the weight of the evidence.

3. That new and material evidence, which if introduced at the trial would probably have changed the verdict or the finding of the court, is discovered which the defendant could not with reasonable diligence have discovered and produced upon trial."

"Rule 311.

A. The court shall grant a new trial if any of the following

grounds is established, provided the substantial rights of the defendant have been thereby prejudiced:

1. That the defendant was not present at any proceeding where his presence is required under these Rules.

2. That the jury has received any evidence out of court, other than that resulting from a view of the premises as provided by Rule 265.

3. That the jurors after retiring to deliberate upon the verdict have separated without leave of court.

4. That any of the jurors has been guilty of misconduct.

5. That the County Attorney has been guilty of misconduct.

6. That the Court has erred in the decision of any matter of law arising during the course of the trial.

7. That the Court has misdirected the jury on a matter of law or has refused to give a proper instruction which was requested by the defendant.

B. The Court shall also grant a new trial when from any other cause not due to his own fault the defendant has not received a fair and impartial trial."

STATEMENT OF THE CASE

The defendant is charged with the unlawful sale of heroin to an undercover agent, John Martinez of the Tucson Police Department. Officer Martinez was introduced to the defendant by one Diego Jauragué a private citizen working in conjunction with the Tucson Police Department in order to seek a favorable disposition of his own pending narcotics case. The alleged sale took place in Tucson, Arizona, with Juaraque Officer Martinez and the defendant present. Additionally, one Libby Spear witnessed the entire transaction, and it is alleged by the defendant that one Libby Spear was in fact the seller of the heroin and that

the defendant, although present, did not participate in the sale.

All reasonable efforts were made by counsel for the defendant to secure the presence of Libby Spear prior to trial, and although counsel for the defendant had interviewed the witness Libby Spear long prior to trial, as the trial date approached, the witness became suddenly unavailable and could not be served with a subpoena. A Motion for Continuance was promptly filed and was heard two days before trial by the Honorable Lee Garrett, Judge of the Pima County Superior Court. The motion was denied.

Counsel for the defendant continued efforts to locate the missing witness Libby Spear prior to trial, and when unsuccessful, once again moved for a con-

tinuance, this time to Trial Judge Mary Ann Richey, Judge of the Pima County Superior Court, shortly before the commencement of the trial. This motion for continuance was also denied.

The trial proceeded with the State calling as its primary witness, Officer John Martinez of the Tucson Police Department and then Police Chemist Walter Tannert. The State did not call Diego Juarague as as its own witness, and defense counsel's motion that the Prosecution be forced to call Juarague as its own witness was denied.

The defendant then requested that the Court exercise its discretion and call Diego Jauragues as the Court's witness, defense counsel stating that the veracity of Juarague was dubious and that the

defendant did not want to be in the unethical position of putting on false testimony and also being placed in the position of inferring to the jury that Diego Jauragué was on the side of the defendant, whereas in fact, he was actually an uncalled prosecution witness. The Court refused to call Diego Jauarague as its own witness, and the defendant was made to call the man as his own witness. Because of the in limine rulings of the Trial Court on the issue of how the examination of Diego Jauragué would be conducted, defense counsel was deprived of an opportunity to fully and properly cross-examine him.

The defendant was found guilty and a sentencing date of August 27, 1970 was set. Prior to the date set for sentencing,

defense counsel fortunately learned that Libby Spear had returned to Tucson. She was immediately contacted and interviewed at the home of defense counsel and a comprehensive statement absolving the defendant of all guilt was taken from her. The Trial Court, in hearing on the Motion for New Trial, ruled that the statement did not amount to an affidavit and, therefore, it could not be considered. Counsel for the defendant then sought to place Miss Spear on the witness stand for the limited purpose of confirming that she, in fact, made the statement and that she intended it to be an affidavit. Libby Spear was placed on the witness stand, but under the advice of her own attorney, Mr. William Healy, of Tucson, Arizona, she declined to answer any questions

regarding the entire case, and the circumstances under which the statement was taken. The affidavit of another witness, unavailable and unknown to the defendant at the time of trial, was submitted for the consideration of the Trial Court on the issue of whether a new trial should be granted. The second "affidavit" set forth certain oral confessions by Libby Spear to the affiant, absolving James Guthrie of all guilt. The Court stated they were accepting this affidavit in evidence, but then nevertheless denied the motion for new trial with the stated reason that the affidavit of Mrs. Moses would be of little remaining value in light of Libby Spear's refusal to testify and adopt her previously given statement as an affidavit.

REASONS FOR GRANTING THE WRIT

ARGUMENT I

THE FAILURE TO GRANT A CONTINUANCE RESULTED IN A DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW.

The defendant first brought a motion for continuance of the trial date before the Honorable Lee Garrett, Judge of the Superior Court of Pima County, on August 11, 1970, two full days before the scheduled trial date. As the trial date approached, counsel for the defendant learned that one Miss Libby Spear, a crucial defense witness who had prevously been interviewed and was quite willing to testify for the defendant, was now out of Tucson and would be unavailable as a witness at the trial. A subpoena for Libby Spear was returned

by the process server unserved. Counsel believed that the father of Libby Spear, Mr. H. G. Spear, knew the presence of his daughter's whereabouts and had indeed forced his daughter to leave town, and thereby be unavailable for trial. The Court denied counsel the opportunity to present the testimony of Mr. Spear, surmising that if Mr. Spear chose to take the Fifth Amendment, the Court doubted whether it would have the authority to order Mr. Spear to testify (Transcript on Hearing for Motion for Continuance, at page 9). This pure speculation and surmise that Mr. Spear might attempt to claim some constitutional privilege was unsubstantiated by the evidence available to the Court, and the refusal of the Court to permit Mr. Spear to take the

witness stand deprived the defendant of an opportunity to locate, and thereupon subpoena Libby Spear for trial. Granting a continuance of the trial would not have been prejudicial or expensive to the State of Arizona. There would have been no injustice to either party in granting the continuance, and yet failure to grant the continuance was most definitely prejudicial to James Guthrie. Hunter v. State, 43 Ariz. 269, 30 P. 2d 499 (1934).

While Rule 243 of the Arizona Rules of Criminal Procedure requires that the application for continuance be in writing and accompanied by "certificate of good faith," and Rule 244 of the Arizona Rules of Criminal Procedure requires the disclosure of the prospective evidence to which a material witness will testify,

counsel explained to the Court his hesitance in not complying with the strict provisions contained in those Rules (See Transcript for Hearing on Motion for Continuance at pages 7-8). In essence, defense counsel felt that disclosure would be a breach of the attorney-client privilege suspecting that Libby Spear thought that she was speaking during the course of a confidential communication. As such, defense counsel could not, for fear of ethical reprisals, waive Libby Spear's personal privilege. The requirements of Rule 244 are, therefore, in certain circumstances, as where the witness is not under the jurisdiction of the Court, in direct conflict with the well-established attorney-client privilege. Because of this, and also

by the fact of excluding Mr. Spear from the possibility of testifying, the Court reduced defense counsel's role to that of ineffective assistance in violation of the Sixth Amendment and constituted an abuse of judicial discretion.

A second motion for continuance was made before the Trial Judge Mary Ann Richey, Judge of the Superior Court, shortly before the commencement of the trial. This second motion was denied on the basis that it had previously been ruled upon by Judge Garrett and there was no new and additional material presented. If it is concluded that Judge Garrett in the first instance was correct in his ruling, the same result would necessarily be reached with regard to the trial court's ruling. But because

of the asserted error of the first judge, Judge Richey was then under a duty to reinstate the Sixth Amendment obligations and render the deficiency void.

While not seemingly on point, the decisions of this Court in United States v. Ewell, 383 U. S. 116 (1966) and Klopfer v. North Carolina, 386 U.S. 213 (1967), lend support to the argument that essential witnesses must be present at trial in order to insulate a conviction from Due Process attack. These cases, while dealing with the fundamental constitutional guarantees of speedy trial rights, have a necessary counterpart manifested in policy considerations emanating from the decisions themselves. The long delay occasioned by undue incarceration prior to trial was said to

impair the ability of the accused to defend himself. Because of the potentiality of important witnesses being lost or their memories fading, it was imperative that they were at the trial in order that the complete truth of facts were assuredly presented. And by the same reasoning, these important policy safeguards should be meant to apply to situations where the witness is, in fact, lost, but all attempts are made to secure his or her presence. The granting of a continuance upon the defendant's request would necessarily prevent him from later alleging a denial of speedy trial rights and further the ends of justice would be greatly served. The denial of a continuance in the present case worked toward no end except

infringement upon Sixth and Fourteenth Amendment guarantees.

ARGUMENT II

THE FAILURE TO GRANT A NEW TRIAL RESULTED IN A DENIAL OF COMPULSORY PROCESS TO OBTAIN WITNESSES AND DUE PROCESS OF LAW.

The written statement of Libby Spear has been filed in a sealed envelope for reivew by this Court. The statement should have been considered by the Lower Court in deciding whether or not to grant a new trial. Merely because a witness decides at some point in time to claim the Fifth Amendment as to any further inquiry on a certain subject, does not operate to exclude all prior statements or comments voluntarily made by that witness.

One reason stated by the Court for refusing to even consider the statement of Libby Spear in deciding whether to grant a new trial, was that the writing did not amount to an affidavit:

> "TR 6-9: Mr. Thikoll: Having read the statement, does the Court believe that the statement on its face, comes up to the quality of an affidavit?"
>
> The Court: No. I don't.
>
> Mr. Thikoll: Because that, perhaps is a requisite for my filing any papers in this Court.
>
> The Court: I don't feel it does."

Counsel for the defendant wanted Libby Spear to testify at least on the very limited issue of whether she acknowledged that the written statement given was as of the time of the statement intended to be an affidavit (TR 2-21).

Defendant was denied an opportunity to make this presentation.

The statement of Libby Spear, even though it omitted the caption "Affidavit" must be acknowledged as some evidence of the defendant's innocence and all such inquiries into a defendant's innocence should be undertaken by the Court in deciding whether a new trial should be ordered.

The 3rd Edition of Black's Law Dictionary defines "affidavit" as "a written or printed declaration or statement of facts, made voluntarily and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oaths." The statement of Libby Spear was taken by Leon Thikoll, an

attorney, duly authorized to practice law in the State of Arizona, and in addition, a notary public. It is noted that counsel for the State did not object to the admission of the statement, nor did they raise any issue of undue influence in obtaining the statement.

It is acknowledged by counsel for the defendant that under the definition of Black's Law Dictionary, and the Ninth Circuit Court of Appeals decision in Robbins v. United States, 345 F. 2d 930 (1965), the statement was not technically an affidavit. See also discussion in Williams v. Pierce County Board of Commissioners, 267 F. 2d 866, 867 (9th Cir. 1956). The statement was certainly of some validity even though it was not up to the quality of a full-fledged affidavit.

Womack v. Allstate Ins. Co., ___Tex. ___, 286 S.W. 2d 308 (1956) re'v. on other grounds, 156 Tex 467, 296 S.2d 233 (1957) At least, the statement should have been allowed as a declaration against a penal interest and thereby excepted from the operation of the hearsay rule. See Deike v. Great Atlantic & Pacific Tea Co., 3 Ariz. App. 430, 415 P.2d 145 (1966). If this Court feels that a new trial should not be granted on the current state of the record, certainly, the case should be remanded to the trial court under the instruction that the trial court consider the statement of Libby Spear in ruling on the Motion for New Trial.

The lower court, in denying the Motion for New Trial, speculated that the witness Libby Spear, at the time of retrial would continue to take the Fifth

Amendment and therefore, there would ultimately be no "new" admissable evidence at the time of the retrial. This was speculation unsupported by the facts. Only at the date and time of the new trial would it be known with certainty whether or not the witness would claim the Fifth Amendment or would indeed, as her previous statement to defense counsel indicated, be happy to testify as to the innocence of James Guthrie. The privilege against compulsory self-incrimination does not prevent an attorney from asking potentially incriminating questions, and the constitutional privilege cannot be claimed in advance of the questions actually being propounded. Defense counsel has a right to call Libby Spear to the witness stand

within the framework of the trial of James Guthrie, and he was denied this right. Communist Party of United States v. SACB, 367 U. S. 1 (1961); Kabbath v. O'Conner, 234 F. Supp. 917 (ED N.Y. 1964) Thoreson v. Superior Court, 11 Ariz.App.62 461 P. 2d 706 (1969); State v. Rogers, 4 Ariz. App. 198, 419 P. 2d 102 (1966). The right to have compulsory process of witnesses is so fundamental that a denial of this right constitutes a violation of the Sixth and Fourteenth Amendments. Washington v. Texas, 388 U. S. 14 (1967).

Now as to the basic propositions governing whether or not the status of the case merits the granting of a new trial, State v. Jeffrey, 11 Ariz. App. 202, 463 P. 2d 97 (1970), states the general rule that the evidence must be in addition

to "new" not merely cumulative evidence nor impeachment evidence. The testimony of Libby Spear was most certainly newly discovered evidence, and her statement, if believed by the new trial jury, would quite likely produce an acquittal for James Guthrie. The testimony of Libby Spear meshed quite closely with the testimony of the prosecution witness Martinez.

In State v. Turner, 104 Ariz. 469, 455 P. 2d 443 (1969), counsel for the defendant offered an affidavit of one Willie McKenzie in support of a motion for new trial. At the hearing on the motion, the prospective witness Willie McKenzie repudiated the affidavit. The court denied the motion for new trial. The instant case may be differentiated

from Turner in that Libby Spear took the Fifth Amendment on the hearing for motion for new trial, and she did not repudiate or in any way challenge the statement previously given.

In State v. Sneed, 98 Ariz. 264, 40 P. 2d 816 (1965), it was pointed out that the issue as to the credibility of witnesses is always reserved for a trial jury. The veracity of Libby Spear and the truthfulness of her statement should be reserved for the consideration of a new trial jury. And in People v. Gompertz, 103 Cal. App. 2d 153, 229 P.2d 105 (1951), a motion for new trial was supported by an affidavit of a prospective witness who testified that he had in fact planted certain incriminating evidence in the wastebasket found in the defendant's

place of business. The Court noted that this affidavit could not be used unless the man agreed to testify at the new trial, and there was no adequate showing that he would, in fact, testify. The court also passed on the credibility of this new witness and found him to be of dubious credibility. There were no such critical findings as to the character and truthfulness of Libby Spear. See also State v. Hughes, 13 Ariz. App. 221, 475 P. 2d 511 (1970).

Therefore, the statement of Libby Spear should have been duly considered in conjunction with the affidavit of Mrs. Moses (appended hereto), and the trial court would then have had substantial gounds for granting a new trial.

ARGUMENT III

THE FAILURE OF THE COURT TO CALL AS ITS OWN WITNESS A GOVERNMENT INFORMER CONSTITUTED A DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW.

It is well established that the trial judge has a right, at his discretion, to call as the court's witness any person having knowledge of the facts. See 9 Wigmore, Evidence §2484 (3d. Ed. Supp 1970); Udall, Arizona Law of Evidence §3 (1960). Diego Jauragué, the police informer, was most certainly a witness adverse to James Guthrie, because of his obviously close connection to the prosecution's position, in that his own particular prosecution on an unrelated narcotics offense would rise or fall on the outcome of the Guthrie prosecution.

Additionally, Jauragué was of dubious veracity, and counsel for the defendant was reluctant to place him on the witness stand as a defense witness because this would have inferred that counsel vouched for his veracity. For this reason, counsel sought the cooperation of the Court in calling Diego Jauragué to the witness stand, subject to both sides having the full right of cross-examination and full rights of impeachment.

McCray v. Illinois 386 U.S. 300 (1967), Roviaro v. United States, 353 U. S. 53 (1957), and Smith v. Illinois 390 U. S. 129 (1968), are different from the case at bar. In those cases, it was the informant's identity that was protected if the social utility warranted such protection. Here, the concern is not

with the informant's identity, because that fact is known. Rather, the consideration involved is that all competent evidence tending toward the ascertainment of the truth should be produced, and that the court must take such action as will tend to bring before it such evidence. See Clingan v. United States, 400 F.2d 489 (5th Cir. 1968); United States v. Clarke, 220 F.Supp. 905(E.D. Pa. 1963); Kissic v. State, 266 Ala. 71, 94 S.2d 202 (1957).

The Clingan decision, Supra, which cites State v. Willis, 241 La. 796, 131 S.2d 792 (1961), states that a sufficient showing of adversity is made when the witness's interest is so clearly on the side of the prosecution that he would logically be unwilling to give a true

account of the transaction. The bias of the witness does not have to be demonstrated on the witness stand, it may be presumed.

Defense counsel in the present case was forced to present a witness whose connection to the prosecution was obvious, without the benefit of an extensive pre-testimony interview and without the opportunity to adequately cross-examine the man.

> "TR108-22: The Court: From what you tell me, you must have talked to him and he hasn't refused.
>
> Mr. Thikoll: I have.
>
> The Court: Refused to discuss this matter with you?
>
> Mr. Thikoll: This is correct."

The witness would most definitely be under motivation to sustain the pro-

secution's theory because of the personal rewards running to that witness. Further indication that the witness was clearly biased is as follows:

> "TR 132-2. Mr. Thikoll: On May 7, 1969, when you went to where James Guthrie lived, did you feel compelled or coerced by the Tucson Police Department to help make sure there was a case against Guthrie?
>
> Jauragué: (TR 132-17) Are you trying to say I had to do it?
>
> Mr. Thikoll: (TR 132-18) To help your case?
>
> Jauragué: (TR 133-1) I went out there, I went out there with Martinez to help him, and the answer would be yes."

The Court somewhat cryptically told defense counsel that though the defense would have to be the one calling Jauragué, and the examination would have to be commenced under the rules of direct examination, there might develop

during the examination of Jauragué, the right for defense counsel to impeach the witness. The particular subject under conversation with the court was whether questions would be permitted as to Diego Jauragué's motivation for testifying against James Guthrie on material issues. At TR 112-19, the court stated, "I am going to allow you to ask this question. I might surprise you and sustain it, but I think you have the right to ask the question."

Defense counsel was at a loss to understand in advance the realm of permitted examination of Diego Jauragué, and was so cramped in his presentation that he was unable to effectively show the jury that Diego Jauragué was either fully motivated to have committed the

entire crime by himself, or could have shielded Libby Spear from prosecution for the crime that he knew James Guthrie had not committed. The defendant was denied an opportunity to fully present his case in a fair and impartial light to the trial jury. The Second Circuit Court of Appeals has stated in United States v. Freeman, 302 F.2d 347, 351 (2d Cir. 1962):

> "When a defendant calls government agents to the stand in an effort to establish some part of his defense he should be given every reasonable leeway in bringing out whatever may be relevant to the issues before the jury. It is pointless to require a showing ... that such witnesses are hostile."

In the present case, the court violated defendant's Sixth Amendment right to effective assistance of counsel

by not calling Diego Jaurague as the court's own witness, or in the alternative by not allowing counsel for the defendant proper latitude in conducting his examination.

C O N C L U S I O N

For the reasons stated, the petition for a writ of certiorari should be granted, and the judgment and order of the Supreme Court of Arizona in this case should be reversed.

Respectfully submitted,

ORIGINAL SIGNED BY:
LEON THIKOLL

Counsel for Petitioner

June 1972.

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, Appellee, v. JAMES LEE GUTHRIE, Appellant.	)	No. 2239 ORDER AFFIRMING JUDGMENT

Appeal from the Superior Court of Pima County Number A-17562
Honorable Mary Anne Richey, Judge
Honorable Lee Garrett, Judge

Gary K. Nelson, Attorney General
William P. Dixon, Assistant Attorney General
Attorneys for Appellee

Thikoll & Johnston
by Leon Thikoll — Attorneys for Appellant

This cause having been heretofore submitted, and the Court having duly considered same, and being now advised in the premises, files its opinion. It is accordingly ORDERED that the judgment and sentence of the Superior Court in this cause are affirmed.

DONE IN OPEN COURT this 21st day of April, 1972.

STATE OF ARIZONA
SUPREME COURT

I, CLIFFORD H. WARD, Clerk of the Supreme Court of the State of Arizona, hereby certify the above to be a full and true copy of the Order Affirming Judgment made and entered in the above entitled cause by said Court on the 21st day of April, 1972.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of said Court this 24th day of May, 1972.

CLIFFORD H. WARD, Clerk

By Mary Ann Hopkins
Deputy Clerk

cc: Attorney General; Pima County Attorney; Judge Mary Anne Richey; Judge Lee Garrett; Presiding Judge of Pima County; Board of Pardons and Paroles; Superintendent of Arizona State Prison; Leon Thikoll.

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Division

FILED
APR 21 1972
CLIFFORD H. WARD
CLERK SUPREME COURT
BY DEP.

STATE OF ARIZONA,
Appellee,

v.

JAMES LEE GUTHRIE
Appellant.

No. 2239

Appeal from the Superior Court of Pima County

Cause No. A-17562

Honorable Mary Anne Richey
Honorable Lee Garrett

AFFIRMED

GARY K. NELSON, Attorney General, Phoenix
By William P. Dixon, Assistant Attorney General,
Attorneys for Appellee

THIKOLL & JOHNSTON Tucson
By Leon Thikoll
Attorneys for Appellant

HOLOHAN, Justice:

Defendant, James Lee Guthrie, was convicted after a trial by jury of the unlawful sale of heroin in violation of A.R.S. 36-1002.02. He was sentenced to a term of not less than five nor more than seven years in the state prison.

On May 7, 1969 in Tucson, the defendant sold a quantity of heroin to John Martinez, an undercover agent of the Tucson Police. Also present at the sale was a 17 year old minor girl, hereinafter

referred to as Miss S, and one Diego Jaurigue, a private citizen who was at the time helping the police in return for a favorable disposition of his own pending narcotics case.

Two days before trial, defendant moved for a continuance on the grounds that Miss S was out of town and unavailable. The motion was denied by the court. The motion was renewed on the day of trial and again denied. During the trial, the defense requested that Diego Jaurigue be called as a witness and that the state be required to put him on the stand. When this request was denied the defense moved to have the court call Jaurigue as the court's witness and after this motion was denied, the defense moved to call Jaurigue as an adverse witness. The trial court denied this motion and the defense called Jaurigue as its own witness.

After the verdict, but before sentencing, defendant moved for a new trial on the grounds of newly discovered evidence and presented a written statement made by Miss S who had returned to Tucson. The statement failed to meet the requirements of an affidavit, so the trial court ordered the witness to appear for the purpose of securing her testimony under oath before the court ruled on the motion. Miss S appeared at the hearing on the motion with assistance of her own counsel, and refused to answer any questions relating to her involvement with the defendant, invoking her right against self-incrimination. The trial court thereupon denied the motion for new trial and sentenced the defendant.

Defendant on appeal argues that the trial court committed error in denying his motions regarding the witness Jaurigue; in denying defense motions for a continuance; and in failing to grant a new trial based on the "new evidence" presented.

Taking the question of the witness Jaurigue, the motion of defense to order the state to call Jaurigue as its witness was clearly not proper. It has been held many times, in many jurisdictions, that the state is not required to call all of its competent witnesses. See State v. Mace, 86 Ariz. 85, 340 P.2d 994 (1959); Halderman v. Territory, 7 Ariz. 120, 60 P.876 (1900); Gallego v. U.S., 276 F.2d 914 (9th Cir. 1960); State v. Young, 3 Ariz. App. 130, 412 P.2d 305 (1966). The ruling of the trial court in refusing the request was clearly correct.

The second motion sought to have the trial court call Jaurigue as the court's own witness. There is no question but that the court in the interests of justice has the power to call its own witnesses. Steinberg v. U.S., 162 F.2d 120 (5th Cir. 1947). See also Udall, Arizona Law on Evidence, §3, page 6. But in denying the motion in this case, the trial judge stated the reasons for declining to exercise that discretionary power in this case by pointing out that the calling of the witness by the court might create the impression that the court doubted the other witnesses, and the witness called by the court was somehow special.

Thus, in order not to leave the impression that the court was dissatisfied with the prosecution's case and to avoid placing special emphasis on one witness, the trial court denied the motion. It was within the discretion of the court to so rule, and there was no abuse of that discretion. See Steinberg v. U.S., supra; Kissic v. State of Alabama, 266 Ala. 71, 94 So.2d 202, 67 A.L.R. 2d 530 (1957).

The defense next asked to call Jaurigue as an adverse witness. The defense relied heavily upon Clingan v. U.S., 400 F.2d 849

(5th Cir. 1968), which held it was error for the court to refuse to allow a government informer to be called as a hostile witness by the defense when "one acting in concert with law enforcement officers refuses to be interviewed by defendant's attorneys concerning the facts and circumstances surrounding the alleged crime and the government informer has previously discussed his testimony with the prosecution." 400 F.2d at 851.

The court properly distinguished Clingan when it denied the motion and stated (RT 111):

> "THE COURT: I am going to deny your motion, Mr. Thikoll. I will say that if this man at any time in your questioning appears to be evading your questions -- I am not going to say I will not let you lead him a little -- but I will not let you start calling him as an adverse witness. It may work into that. I don't think you follow the case [Clingan] where you state to me that you have talked to him, he has discussed the case with you, and from what you say apparently he has been very open with you."

Counsel for the defense was advised that the court would follow a lenient policy on the matter of impeachment of his own witness since the witness in question could be considered more in the nature of a witness for the state.

The following excerpt from the transcript convinces us that the court was extremely lenient in allowing, over objections of the prosecuting attorney, testimony which tended to impeach Jaurigue's credibility and to bring out matters favorable to the defense.

(RT 125-126)

> "Q [Defense Attorney] * * * On that date, May 7, 1969, were you working for the Tucson Police Department as a full time employee?

"A [Jaurigue] No.

"Q Did you get any money for what you did that particular night?

"A No.

"Q Have you been made any promises for what you might obtain -- strike that. Why were you there that night with John Martinez?

"MR. WEISS: I believe the question is the same. I believe Mr. Thikoll is attempting to impeach his own witness and there has been no showing that the witness is hostile and no showing of surprise.

"THE COURT: Overruled.

"Q Why were you there that night with John Martinez?

"A I had been arrested for the sale of marijuana and I talked to Detective Wolff and my lawyer. They told me if I helped, they would help me.

"Q Were you there that night with John Martinez trying to help your own case?

"A Yes.

"Q As a result of what you did that evening, was your case reduced?

"A Yes.

"Q Did you ever go to jail on your case after that?

"THE COURT: I will sustain the objection from here on."

While the trial court denied the defense motion to call the witness Jaurigue as an adverse witness, the defense was able to present the matters favorable to its case through that witness.

What is important, no matter which way it is done, is whether the defendant was given the opportunity to fully present his case. The wide range of questioning granted to the defendant and the

defendant's failure to renew his motion as the court directed him to in the event the witness became uncooperative convinces us that there was no prejudice to the defense. See State v. Narten, 99 Ariz. 116, 407 P.2d 81 (1965).

On August 11, 1970, 2 days before trial, defendant moved for a continuance on the grounds that a material witness was absent, and the motion was denied. Pursuant to Rule 241, Rules of Criminal Procedure, 17 A.R.S., good cause must be shown, and the granting of this motion is within the discretion of the trial court.

The defendant, however, failed to comply with Rule 243, Rules of Criminal Procedure, in not filing with his motion a "certificate of good faith" and his failure to comply with Rule 244 in not setting forth the facts expected to be proved by the witness, the name and residence of the witness, the facts showing due diligence to obtain the witness' presence and facts showing defendant expects to be able to procure the attendance of the witness at a specified time as required by that Rule. See State v. Saiz, 3 Ariz. App. 223, 413 P.2d 282 (1966).

It should also be noted that the trial originally set for May 12th had once before been continued on stipulated agreement and reset for August. The second motion for continuance made the day of trial was also denied. Under the circumstances presented there was no abuse of discretion in not granting the continuance.

Lastly, defendant contends the denial of his motion for a new trial based upon new evidence was an abuse of discretion. Following the verdict but before sentencing, defendant's counsel obtained an unsworn written statement from Miss S. We agree with

the trial court that it did not meet the requirements of an affidavit; hence, the ordering of a hearing was proper. Rule 312, Rules of Criminal Procedure.

A hearing was held on the motion for new trial, and Miss S was called to testify. She appeared with her own counsel, and she thereafter invoked her privilege against self-incrimination and refused to answer any question on the subject involved in her former statement.

A motion for new trial by its very nature is one which is not favorably looked upon, and generally the trial court is very cautious in granting it. State v. Schantz, 102 Ariz. 212, 427 P.2d 530 (1967). The court must be satisfied by the affidavits or testimony that the evidence to be presented at the new trial is not only new material, and gotten with due diligence but that such evidence will probably cause a different result. State v. Davis, 104 Ariz. 142, 449 P.2d 607 (1969).

Thus the trial court on a motion for new trial is charged with the duty of weighing evidence. State v. Turner, 92 Ariz. 214, 375 P.2d 567 (1962). The trial court was faced with the fact that at the hearing the witness claimed her Fifth Amendment right and would obviously do the same at trial, and her statement in a new trial would not be admissible. In addition, the statement implicated the defendant in the case and showed that he was present when Miss S was allegedly given the heroin for keeping, and thereafter Miss S and the defendant were together at all times until the sale took place, although her version of the events at the sale differed from the state's. The showing made by the defense was not sufficient to justify the granting of a new trial. State v. Davis, supra,

State v. Turner, supra; State v. Peters, 60 Ariz. 102, 131 P.2d 814 (1942); and see People v. Gompertz, 103 Cal. App. 153, 229 P.2d 105 (1951), on very similar facts. The decision of the trial court in denying the motion for new trial in this case was clearly correct.

The judgment and sentence of the Superior Court in this cause are affirmed.

WILLIAM A. HOLOHAN
Justice

CONCURRING:

FRED C. STRUCKMEYER, JR.
Justice

LORNA E. LOCKWOOD
Justice

CLIFFORD H. WARD
CLERK

Supreme Court

STATE OF ARIZONA

Phoenix

85001

May 24, 1972

MARY ANN HOPKINS
DEPUTY CLERK

STATE OF ARIZONA, Appellee, v. JAMES LEE GUTHRIE, Appellant.	Supreme Court No. 2239 Pima County No. A-17562

The following action was taken by the Supreme Court of the State of Arizona on May 23, 1972 in regard to the above-titled cause:

"ORDERED: Petition for Rehearing - DENIED."

Certified copy of Order Affirming Judgment issued this date.

CLIFFORD H. WARD, Clerk

By Mary Ann Hopkins
Deputy Clerk

TO:

Leon Thikoll, Esq., Thikoll & Johnston, 45 W. Pennington St., Tucson 85701
Hon. Gary K. Nelson, Attorney General, 159 State Capitol, Phoenix 85007
Rose S. Silver, Pima County Attorney, 131 West Congress, Tucson 85701
Hon. Mary Anne Richey, Judge of Pima County Superior Court, Tucson 85701
West Publishing Company, 50 Kellogg Blvd., St. Paul, Minnesota 55102

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Plaintiff, vs. JAMES LEE GUTHRIE, Defendant.	NO. A-17562 AFFIDAVIT OF ESTHER MOSES

STATE OF ARIZONA)
(ss.
County of Pima)

I, ESTHER MOSES, residing at 4617 East 27th Street, Tucson, Arizona, Telephone No. 327-2274, am the wife of J. C. MOSES, and have resided in Tucson all my life.

I know a young girl by the name of LIBBY SPEAR. At the home of JAMES GUTHRIE'S mother, on April 21, 1970, at approximately 1:00 o'clock p. m., I heard Libby Spear say to Mrs. Guthrie, approximately the following things:

"Mrs. Guthrie, don't worry about the other case that is coming up, you know, the one at the apartment, I'm going to testify for Jimmy in that case. Jimmy did not do it."

DATED this 19th day of August, 1970.

Esther Moses
Esther Moses

SUBSCRIBED AND SWORN to before me this 19th day of August, 1970.

My commission expires:
My Commission Expires Nov. 12, 1973

Howard Wade
Notary Public

LAW OFFICES OF TRASKO, & JOHNSTON SUITE 200 40 WEST PENNINGTON STREET TUCSON, ARIZONA 85701

PROOF OF SERVICE

STATE OF ARIZONA)
) ss:
COUNTY OF PIMA)

I, LEON THIKOLL, Attorney of record for JAMES LEE GUTHRIE, Petitioner, depose and say that on the 18 day of July, 1972, I served three (3) copies of the foregoing Petition for Writ of Certiorari on GARY K. NELSON, Attorney General for the State of Arizona, respondent herein, by depositing the same in a United States post office mail box, with first class postage prepaid, addressed to him at his post office address.

ORIGINAL SIGNED BY:
LEON THIKOLL

LEON THIKOLL

SUBSCRIBED and SWORN to before

me this 18 day of July, 1972.

ROSE V. PEASLEY

Notary Public

My Commission Expires:

7-5-73

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Rule 243, Arizona Rules of
Criminal Procedure 1

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 72-123

JAMES LEE GUTHRIE,

Petitioner,

vs.

THE STATE OF ARIZONA and GARY K. NELSON, as Attorney General of the State of Arizona,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ARIZONA

GARY K. NELSON
The Attorney General of
the State of Arizona

JOHN S. O'DOWD
Assistant Attorney General
415 West Congress
Tucson, Arizona

Attorneys for Respondent

ARGUMENT

I. RESPONDENT'S ARGUMENT THAT DENIAL OF DEFENSE MOTION FOR CONTINUANCE DID NOT DEPRIVE PETITIONER OF EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW

Under Rule 241 of Arizona Rules of Criminal Procedure, the party moving for a continuance must show good cause and the granting of the motion is within the discretion of the trial court. As was stated by the Arizona Supreme Court in its opinion in this cause, as shown on page 45 of Petitioner's Brief, the petitioner in this case failed to comply with the requirements of Rule 243, Arizona Rules of Criminal Procedure, in making his motion for continuance:

> The defendant, however, failed to comply with Rule 243, Rules

> of Criminal Procedure, in not filing with his motion a "certificate of good faith" and his failure to comply with Rule 244 in not setting forth the facts expected to be proved by the witness, the name and residence of the witness, the facts showing due diligence to obtain the witness' presence and facts showing defendant expects to be able to procure the attendance of the witness at a specified time as required by that rule. See State v. Saiz, 3 Ariz.App. 223, 413 P.2d 282 (1966).

Since the trial had been pending since August, 1969, and since defense counsel knew of the witness' testimony when interviewing her 45 days before trial, the denial of the continuance motion made two days before the August 13, 1970 trial date was certainly within the sound discretion of the trial court

II. RESPONDENT'S ARGUMENT THAT COURT DID NOT DENY COMPULSORY PROCESS AND DUE PRO-

CESS TO PETITIONER
BY FAILING TO GRANT
A NEW TRIAL

As was stated by the Arizona Supreme Court in its opinion in this cause, as shown on pages 46 and 47 of Petitioner's Brief, the trial court:

> . . .was faced with the fact that at the hearing the witness claimed her Fifth Amendment right and would obviously do the same at trial, and her statement in a new trial would not be admissible. In addition, the statement implicated the defendant in the case and showed that he was present when Miss S. was allegedly given the heroin for keeping, and thereafter Miss S. and the defendant were together at all times until the sale took place, although her version of the events at the sale differed from the state's. The showing made by the defense was not sufficient to justify the granting of a new trial. (cases cited).

Under the circumstances, Respondent submits that the trial court's ruling denying Petitioner a new trial was correct and that said ruling, as shown by the record, was based upon the finding that the evidence would not probably cause a different result. State v. Davis, 104 Ariz. 142, 449 P.2d 607 (1969)

III. RESPONDENT'S ARGUMENT THAT PETITIONER WAS NOT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW BY FAILURE OF COURT TO CALL DIEGO JAURAGUE AS ITS OWN WITNESS

The Arizona Supreme Court in its opinion in this cause, as shown on page 42 of Petitioner's Brief, pointed out that the trial judge stated as reasons for declining to call Jauragua as its

witness that such action might create the impression that the court doubted the other witnesses and the witness called by the court was somehow special. The Arizona Supreme further stated:

> Thus, in order not to leave the impression that the court was dissatisfied with the prosecution's case and to avoid placing special emphasis on one witness, the trial court denied the motion. It was within the discretion of the court to so rule, and there was no abuse of that discretion. (citing cases).

It is clear from the record in this case that Petitioner's counsel was given ample latitude in examining Jauragué. The witness appeared cooperative in answering the questions posed and at no time did Petitioner's counsel renew his motion to have the witness declared

hostile and uncooperative.

Clingan v. United States, 400 F.2d 489 (5th Cir., 1968) was clearly distinguishable as was pointed out to counsel for Petitioner by the trial judge. (R.T. 111) The following excerpt from the transcript shows that Petitioner was given ample latitude in bringing out testimony from Jauragué which impeached his credibility and was favorable to the defense.

> Q. (Defense Attorney) * * *On that date, May 7, 1969, were you working for the Tucson Police Department as a full time employee?
>
> A. No.
>
> Q. Did you get any money for what you did that particular night?
>
> A. No.
>
> Q. Have you been made any promises for what you might obtain -- strike that. Why were you there that night with John Martinez?

MR. WEISS: I believe the question is the same. I believe Mr. Thikoll is attempting to impeach his own witness and there has been no showing that the witness is hostile and no showing of surprise.

THE COURT: Overruled.

Q. Why were you there that night with John Martinez?

A. I had been arrested for the sale of marijuana and I talked to Detective Wolff and my lawyer. They told me if I helped, they would help me.

Q. Were you there that night with John Martinez trying to help your own case?

A. Yes.

Q. As a result of what you did that evening, was your case reduced?

A. Yes.

Q. Did you ever go to jail on your case after that?

THE COURT: I will sustain the objection from here on. (RT. 125-126)

As was stated by the Arizona Supreme Court in its opinion in this cause, as shown on page 44 of Petitioner's Brief:

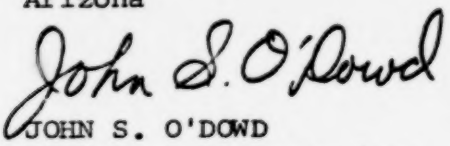
> What is important, no matter which way it is done, is whether defendant was given the opportunity to fully present his case. The wide range of questioning granted to the defendant and the defendant's failure to renew his motion as the court directed him to in the event the witness became uncooperative convinces us that there was no prejudice to the defense. (citing case).

CONCLUSION

WHEREFORE, Respondent prays that this court decline to accept jurisdiction in this cause and dismiss the petition herein.

Respectfully submitted,

GARY K. NELSON
The Attorney General of
Arizona



JOHN S. O'DOWD
Assistant Attorney Gen-
eral
Attorneys for Appellee

August, 1972.